



**Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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IN THE MATTER OF CLAIM AGAINST THE  
DEALER BOND OF LENZ SALES & SERVICE,  
INC.

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Case No. TR-00-0020

**FINAL DECISION**

This is a final decision on the claim of Mr. John Lee Kiser dated March 7, 2000, filed with the Wisconsin Department of Transportation (the "Department") against the motor vehicle dealer bond of Lenz Sales & Service, Inc. (the "Dealer"). The claim, along with the documents gathered by the Department in its investigation, was referred to the Division of Hearings and Appeals for hearing. The parties were allowed to file any additional information they wished to have considered in issuing a preliminary determination in the matter, and both parties did so. On September 1, 2000, the undersigned issued a Preliminary Determination in the matter, which denied Mr. Kiser's claim. By letter dated September 20, 2000, filed on September 21, 2000 (Exh. 1), Mr. Kiser objected to the Preliminary Determination.

A contested case hearing on the claim was held on November 10, 2000, in Fond du Lac, from 10:00 a.m. to 4:00 p.m. Mr. Kiser appeared and represented himself, and Mr. Jerry Lenz appeared and represented the Dealer. Capital Indemnity Insurance Company acknowledged receiving notice of the hearing, but opted not to appear. Mr. Kiser and Mr. Lenz both testified, and Mr. Kiser also presented the testimony of Mr. Dale Roeseler. Exhibits 1 through 40 and 42 were marked and received in evidence.

The parties to this proceeding are certified as follows:

Mr. John Lee Kiser  
W3041 Walnut Road  
Fond du Lac, WI 54935

Lenz Sales & Service, Inc.  
536 S. Seymour Street  
Fond du Lac, WI 54935, by

Capitol Indemnity Insurance Company  
P.O. Box 5900  
Madison, WI 53705-0900

## FINDINGS OF FACT

1. Lenz Sales & Service, Inc. (the "Dealer") is a motor vehicle dealer licensed by the Department pursuant to Wis. Stat. § 218.01 (1997-1998). The Dealer's facilities are located at 536 S. Seymour Street in Fond du Lac, Wisconsin. Mr. Jerry Lenz owns and operates the Dealer.

2. The Dealer has had surety bond no. 582393 from Capitol Indemnity Insurance Company in place from April 1, 1994 to the present.

3. On or about March 12, 1999, Mr. John Lee Kiser purchased a 1985 Chevrolet model K3500 truck, VIN 2GCEC14H7F1216993 (the Vehicle) from the Dealer for a full purchase price, including sales tax and fees, of \$9,790.00. The Vehicle had a rebuilt engine that the Dealer had recently installed. The face of the contract of sale showed that the Vehicle was sold with a *dealer* warranty "On Engine Only" for 36 months or 50,000 miles. The contract of sale shows all other warranties being disclaimed, with the Vehicle being sold "as is" except with respect to the limited warranty on the engine.

4. Contrary to the indication shown on the contract of sale, the limited warranty on the rebuilt engine was extended not by the Dealer, but rather by its manufacturer, a Milwaukee-based company known as Engine & Transmission Exchange, Inc. ("ETE"). The Dealer provided Mr. Lenz with a copy of the ETE's written warranty at the time of the sale. (Exh. 42). Also at the time of the sale, Mr. Kiser was aware that the Vehicle contained a rebuilt engine and that it was warranted by ETE, not the Dealer. Kiser was thus not misled by the erroneous indication on the face of the contract of sale that the *Dealer* had warranted the rebuilt engine. ETE's written warranty that the Dealer provided to Mr. Kiser contained the information required by Wis. Adm. Code § Trans 139.06(1).

5. The sale price of the Vehicle was \$9,607.14. As part of the transaction, the Dealer gave Mr. Kiser a trade-in allowance of \$8,000 on Kiser's 1987 Toyota 4-Runner, resulting in a "Trade Difference" of \$1,607.14. The sales tax on the transaction was calculated on this "Trade Difference" figure, and amounted to \$80.36. Without the trade-in allowance of \$8,000.00, the sales tax would have been an additional \$400.00.

6. The contract of sale shows the sum of \$8,000.00 being added back in to the purchase price (after calculation of the sales tax amount of \$80.36) on Line 15, which is described as "Balance Due to Lenz on Owned Trade-In". Thus, with the addition of registration, title, and other fees totaling \$102.50, the amount due on delivery totaled \$9,790.00. If the transaction had not included any entries respecting the trade-in, the amount due on delivery would have been increased by \$400.00 --the amount of the sales tax on \$8,000. The Wisconsin Title & License Plate Application for the Vehicle dated March 17, 1999, showed a trade-in allowance of \$8,000.00, and showed the purchase amount subject to sales tax to be \$1,607.14, for a total sales tax of \$80.36. Both Lenz and Kiser signed this form, and thereby certified that the information provided thereon was true and correct.

7. The trade-in transaction was designed to reflect a so-called "pass-through" sale on the trade-in vehicle. In such a transaction, a dealer agrees to accept from the purchaser a vehicle for trade-in, with the understanding that a third person previously identified by the purchaser will

buy the trade-in vehicle from the dealer at a specified price, rather than directly from the purchaser. The net effect of a completed pass-through transaction would be to allow the purchaser to avoid paying sales tax on the amount that the third party has agreed to pay for the trade-in vehicle.

8. The "pass-through" transaction as reflected on the contract of sale was a sham designed to reduce the transaction cost to Mr. Kiser. In reality, Mr. Kiser had not identified a third party to purchase the trade-in vehicle for \$8,000 or for any price. (The value of the trade-in vehicle in March 1999 was about \$1,500.00, far less than the \$8,000 value assigned to it in the sales contract.)

9. Contemporaneous with the signing of the contract of sale on March 12, 1999 the Dealer and Mr. Kiser signed a Wisconsin Title & License Plate Application (MV-11) with respect to the trade-in vehicle. This MV-11 was postdated March 19, 1999, and reflects the sale of the trade-in vehicle from the Dealer to Mr. Kiser on that date for a consideration of \$5.00. The reconveyance of the trade-in vehicle from the Dealer to Kiser at nominal consideration was necessary to complete the sham "pass-through" sale.

10. Sometime after the Department completed its investigation of Mr. Kiser's complaint, and after the matter regarding the amount of sales tax on the Vehicle had been evaluated, the Dealer remitted an additional \$400.00 in sales tax to the Department of Revenue. The Dealer did not collect this amount from Mr. Kiser before remitting the sum to the Department of Revenue.

11. The Dealer's representations on the title application for the Vehicle pertaining to the sales tax violated Wis. Stat. § 342.06(2), which prohibits the making of false statements in an application for a certificate of title. Mr. Kiser did not suffer a loss caused by this violation, but rather benefited from the violation by not paying the additional \$400 in sales tax that was due.

12. The Wisconsin Buyers Guide that the Dealer provided to Mr. Kiser at the time of the sale did not have the "Used Vehicle General Condition" and "Vehicle Equipment Requirements" sections completed. Failure to complete these parts of the Buyers Guide constitutes a violation of Wis. Adm. Code § Trans 139.04.

13. The violation regarding the incomplete Buyers Guide caused a loss to Mr. Kiser with respect to the absence of a representation respecting the "Emission Equipment". At the time of the sale, the Vehicle did not have appropriate emissions equipment, including a catalytic converter. The Wisconsin Buyer's Guide failed to indicate that the Vehicle was not compliant with the requisite emissions equipment, thus violating Wis. Adm. Code § Trans 139.04. The Dealer failed to present sufficient evidence to support its claim that emissions equipment is not required on the Vehicle. The cost of installing emissions equipment is \$313.84. The monetary damages for the emissions control items were caused by a violation for which the Dealer's license may be suspended or revoked, and therefore the amount of \$313.84 is recoverable against the bond.

14. The violation regarding the incomplete Buyers Guide did not cause any other loss to Kiser. Kiser test drove the Vehicle before the purchase and found its operation and condition satisfactory at the time of sale. There is insufficient evidence to demonstrate that if the Buyers Guide had been properly completed before the sale, that the "No" box would have been checked

for any items listed in the "Used Vehicle General Condition" section. There is also insufficient evidence to show that any items other than "Emission Equipment" would have been indicated to be "Not Legal" in the "Vehicle Equipment Requirements" section. Accordingly, there is insufficient evidence to show that the violation regarding the Buyers Guide caused any loss to Kiser other than with respect to the emissions equipment.

15. After the purchase, Kiser reported a number of problems with the Vehicle and brought it to the Dealer for service numerous times between March 1999 and August 1999. The Dealer serviced the Vehicle during these visits, and performed repairs covered by the ETE's warranty on the engine without charge, as well as non-warranty service for appropriate charges.

16. By late August 1999, relations between the Dealer and Kiser had become strained and Lenz then told Mr. Kiser that the Dealer would no longer service the Vehicle. ETE's written warranty provides that for warranty service the purchaser should go first to the installer of the rebuilt engine (in this case the Dealer), but that "if this is impractical or impossible" the purchaser "may contact ETE directly." (Exh. 42). When the Dealer refused to provide further service to Kiser in August 1999, it then became a practical impossibility for Kiser to get warranty service from the Dealer. Thereafter, Kiser's remedy for any further warranty service under the terms of the warranty was to contact ETE to arrange for another service provider. The Dealer's refusal to provide Kiser further service, whether service under ETE's warranty or otherwise, does not violate any provision which would provide grounds for suspension or revocation of the Dealer's motor vehicle dealer's license.

17. Mr. Kiser filed a bond claim dated March 7, 2000, of \$19,117.14, comprised of the following four components:

- a. \$9,607.14 for the Vehicle (upon returning the Vehicle to the Dealer);
- b. \$8,000.00 for the "trade-in allowance" on the Toyota 4-Runner (upon conveying the 4-Runner to the Dealer);
- c. \$710.00 in various repair and maintenance costs as follows:
  - (1) Invoice 0001970 from the Dealer dated May 7, 1999, which shows no mileage reading but reflects the following charges of \$175 for front leaf springs, \$19.95 for an oil change, and \$19.50 for "Shop Supplies"
  - (2) Invoice 0002098 from the Dealer dated July 12, 1999, which shows mileage of 77,286 miles (compared to mileage of 74,548 at the time of sale) and reflects a charge of \$86.06 for a new starter.
  - (3) Invoice 0004057 from Big John's Towing dated October 26, 1999, reflects a charge of \$50.00 for towing of the Vehicle.
  - (4) Invoice 7584 from Pit Stop Plus dated October 26, 1999, which shows mileage of 80,093 miles, and a charge of \$65.50 for inspection of various items.
  - (5) Invoice 2922 from Pit Stop Plus dated October 27, 1999, which reflects mileage of 80,093 miles and shows a charge of \$17.95 for an oil change, \$50 for a tow charge, and \$25 for labor for inspection of a suspected fuel leak at the carburetor

(nothing found), plus tax, for a total of \$96.55. The tow charge in this invoice is the same tow charge as that set forth in Invoice 0004057.

- (6) Invoice 15749 from Rich's Engine Service dated November 2, 1999, which reflects mileage of 80,094 miles, shows a charge of \$57.50 for inspection of various items.
- (7) Invoice 7710 from Pit Stop Plus dated December 10, 1999, which reflects mileage of 81,318 miles, shows a charge of \$57.99 to "inspect plugs, wires, cap, rotor, replace PCV valve, adjust timing and carburetor" and "rotate tires".
- (8) Invoice 7712 from Pit Stop Plus dated December 13, 1999, which reflects mileage of 81,360 miles, show a charge of \$72.53 to replace the "rear U-joint".

d. \$800.00 for attorney fees.

18. None of the monetary damages described in the preceding paragraph have been demonstrated to have been caused by the violations of the Dealer that would be grounds for revocation of his motor vehicle dealer license as specified in Wis. Adm. Code § Trans 140.21(1)(c)1.

a. With respect to paragraph 17(a) above, Mr. Kiser testified that his desired remedy was to have the Vehicle repaired, and that he did not wish to rescind the sale. Accordingly, assuming that rescission would be an appropriate remedy under a claim under a dealer bond, Kiser has abandoned this requested relief.

b. With respect to paragraph 17(b) above regarding the Toyota 4-Runner (the ostensible "trade-in" vehicle) Mr. Kiser has legal title to this vehicle and has had possession of it at all relevant times. Mr. Kiser has not suffered a loss in any amount with respect to the "trade-in" vehicle.

c. With respect to the repairs and other expenses reflected in paragraph 17(c), none were caused by a violation for which the Dealer's license may be suspended or revoked. There is insufficient evidence to demonstrate that any of these items would have resulted in a negative notation on the Buyers Guide, so the Dealer's failure to properly complete the Buyers Guide did not cause these losses. Further, none of these items were covered by any warranty.

d. The attorneys fees claimed are not recoverable elements of damages under a claim under a dealer bond under Wis. Adm. Code § Trans 140.21(2)(e).

19. Mr. Kiser presented evidence of the cost of certain work on the transmission, emergency brake, carburetor, front stabilizer bushings, and unspecified "miscellaneous parts" at a total cost of \$3,681.00 (Exh. 34). There is insufficient evidence to demonstrate that these items were caused by violations for which the Dealer's license may be suspended or revoked, and thus none of those items are recoverable against the bond. The Dealer's failure to properly complete the Buyers Guide did not cause these losses, because there is insufficient evidence to demonstrate that any of these items would have resulted in a negative notation on the Buyers Guide at the time of sale. Further, none of these items were covered by the manufacturer's warranty, and all other warranties were appropriately disclaimed.

20. The rebuilt engine has a slight oil leak and requires the addition of a quart of oil about every two weeks under normal use. There is insufficient evidence showing the cause of the leak, whether from a defect in the engine, from improper installation of the engine, or some other cause. Mr. Kiser presented evidence that the cost to repair the oil leak would be \$1,305.25 (Exh. 34). Assuming this leak is covered by ETE's warranty, the Dealer is not obliged to provide service under ETE's warranty, and all other warranties were properly disclaimed. The Dealer has not violated any provision that would support license suspension or revocation with respect to the oil leak.

21. Mr. Kiser's bond claim was filed within three years of the ending date of the period the Capitol Indemnity bond was in effect, and thus the claim is timely.

22. Mr. Kiser has suffered an actual loss in the amount of \$313.84 with respect to emissions equipment that was caused by an act of the Dealer that would be grounds for suspension or revocation of the Dealer's motor vehicle dealer license under Wis. Adm. Code § Trans 140.21(1)(c)1. Accordingly, that part of the claim is allowable. No other components of the claim were demonstrated to have been caused by an act of the Dealer for which the Dealer's license may be suspended or revoked, and thus no other part of the claim is allowable.

### **DISCUSSION**

The procedure for determining claims against dealer bonds is set forth in the Wisconsin Administrative Code at Chapter Trans 140, Subchapter II. Section Trans 140.21(1) provides in relevant part as follows:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the [licensee's] agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.01(3)(a)1. to 14., 18. to 21., 25. or 27. to 31., Stats.

\* \* \* \*

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

Accordingly, to allow a claim, a finding must be made that the Dealer violated one of the subparagraphs of § 218.01(3)(c), Stats., listed in Wis. Adm. Code § Trans 140.21(1)(c)1, and that the violation caused the loss claimed.

The Dealer has stated that it will refuse to provide any further service on the Vehicle, which would include a refusal to perform any service pursuant ETE's warranty. Wis. Adm. Code § Trans 139.06(10) provides as follows:

(10) WARRANTOR BASIC OBLIGATION. It is an unfair practice and prohibited for a warrantor to fail to service or repair a motor vehicle in accordance with the terms and conditions of the warranty or service agreement.

Since ETE, not the Dealer, is the warrantor, the Dealer's refusal to provide any further service on the Vehicle does not constitute a violation of this provision. Accordingly, assuming that the leak would be covered by ETE's warranty, the Dealer's refusal to provide any further service on the Vehicle does not amount to a violation of Wis. Adm. Code § Trans 139.06(10).

The Dealer provided Mr. Kiser with ETE's written warranty in the form and content required by Wis. Adm. Code § Trans 139.06(1), which provides as follows:

(1) CONTENTS. If a sale of a motor vehicle by a licensee is made subject to a warranty, the warranty shall be in writing and shall be provided to the purchaser at the time of delivery of the vehicle and shall include the following items:

(a) Clear identification of the names and addresses of the warrantors.

(b) Clear identification of the purchaser to whom the warranty is extended.

(c) Parts covered. Use of the terms "power train" or "drive train" to describe parts or systems covered is prohibited.

(d) Exceptions and exclusions from the terms of the warranty.

(e) A statement of what the warrantor shall do in the event of a defect or malfunction, at whose expense and for what period of time.

(f) A statement of what the purchaser shall do and expenses the purchaser shall bear.

(g) The procedure the purchaser should take in order to obtain performance of any obligation under the warranty, including the identification of any class of persons authorized to perform the obligations set forth in the warranty.

(2) DISCLOSURE. The elements of the warranty shall be stated in words or phrases which clearly disclose the nature or scope of the warranty.

The Dealer provided Mr. Kiser with the ETE's written warranty that contained the information required by § Trans 139.06(1) & (2), and thus the Dealer did not violate this provision.

The Dealer improperly completed the contract of sale by erroneously indicating on its face that the warranty on the rebuilt engine was the *Dealer's* warranty, not the manufacturer's. This constitutes a violation of Wis. Adm. Code § Trans 139.05, which requires an accurate indication of whether a warranty is extended by a dealer or by a manufacturer. This constitutes an act for which a motor vehicle dealer license can be suspended or revoked under §

218.01(3)(a)(4), Stats. This violation would support a claim upon a dealer bond under Wis. Adm. Code § Trans 140.21(1)(c)(1), if the claimant demonstrates that the violation caused an actual loss. Mr. Kiser has not demonstrated that he suffered a loss as a result of this violation. To the contrary, the evidence shows that Mr. Kiser was aware that ETE was the warrantor of the rebuilt engine, not the Dealer, so that Mr. Kiser was not misled by the misinformation contained on the contract of sale.

The Dealer failed to fully complete the Wisconsin Buyers Guide. This failure violated Wis. Adm. Code § Trans 139.04(6)(a), and thus constitutes an act for which a motor vehicle dealer license can be suspended or revoked under § 218.01(3)(a)(4), Stats. This act in turn supports a claim upon a dealer bond under Wis. Adm. Code § Trans 140.21(1)(c)(1), if the claimant demonstrates that the violation caused an actual loss. Mr. Kiser demonstrated a resulting loss only with respect to the emissions equipment. The preponderance of the evidence demonstrates that (a) the Vehicle was required to have emissions equipment, (b) it did not have such equipment, and (c) the Buyers Guide failed to disclose the absence of this equipment. The Dealer's failure to fully complete the Buyers Guide is a violation of Wis. Adm. Code § 139.04, and is an act for which the Dealer's license may be revoked or suspended. There is insufficient evidence to support the Dealer's claim that the Vehicle is not required to have emissions equipment under state and federal law. This violation caused Mr. Kiser a loss of \$313.84, which is the cost of installing such equipment. Accordingly, Mr. Kiser has demonstrated that he has suffered an actual loss recoverable against the bond of \$313.84.

An alternative and independent basis for allowing recovery of \$313.84 for the emissions equipment is that the contract of sale failed to contain the notice required by Wis. Adm. Code § Trans 139.04(5) that the Vehicle "cannot be legally operated on Wisconsin highways". This is also an act for which a motor vehicle dealer license may be suspended or revoked, and which in turn would support a claim on a dealer bond.

The Dealer also violated Wis. Stat. § 342.06(2), which prohibits the making of false statements in an application for a certificate of title. The application for certificate of title for the Vehicle showed the amount subject to tax to be \$1,607.14, when the true amount subject to tax should have been reported to be \$9,607.14. This constitutes an act for which a motor vehicle dealer license can be suspended under § 218.01(3)(a)(14), Stats. This act in turn supports a claim upon a dealer bond under Wis. Adm. Code § Trans 140.21(1)(c)1, if it is demonstrated that the violation resulted in a loss to the claimant. However, Mr. Kiser has not demonstrated that this violation caused him a loss. It appears instead that he benefited because the Dealer ultimately paid the additional \$400 sales tax due, not Mr. Kiser.

None of the claims respecting any service thus far completed or service recommended to be performed are allowable. The Dealer is not obliged to perform any repairs that would be covered under the manufacturer's warranty on the engine. Further, none of the service thus far performed or service recommended to be completed have been shown to be related to deficiencies that should have been set forth in the Wisconsin Buyers Guide, and thus are not recoverable against the bond on this theory either.

None of the repairs or maintenance recommended in Exhibit 34 (see ¶¶ 19-20 above) are recoverable, except for the emissions equipment as described. Mr. Kiser has not demonstrated



that the claimed need for these repairs was caused by an act of the Dealer for which the license may be suspended or revoked. Mr. Kiser has failed to demonstrate that these items were not in satisfactory working order at the time of the sale, and thus has not demonstrated that the Buyers Guide should have reflected deficiencies in the Vehicle's condition in these areas. To the extent that repair of the oil leak would be covered by ETE's warranty, the Dealer is not so obliged to perform such repairs under ETE's warranty, and thus the Dealer has not violated any provision that would form the basis of a claim under the bond. Mr. Kiser has thus failed to show that these items of repair were caused by an act of the Dealer for which the Dealer's license may be suspended or revoked.

Mr. Kiser notes that the Dealer appears to have violated regulations of the Department of Agriculture, Trade and Consumer Protection (ATCP), Wis. Adm. Code Chapter ATCP 132, with respect to certain repairs on the Vehicle. However, violations of the ATCP regulations are not acts for which a motor vehicle dealer license can be suspended or revoked specified under Wis. Adm. Code § Trans 140.21(1)(c)1, and thus do not support a claim upon a motor vehicle dealer bond dealer bond

The claim for attorney's fees of \$800 is not recoverable. Recovery of these items is expressly prohibited by Wis. Adm. Code § Trans 140.21(2)(e).

### **CONCLUSIONS OF LAW**

1. John Lee Kiser's claim arose on March 12, 1999, the date he entered into a contract of sale to purchase the Vehicle from Lenz Sales & Service, Inc. The surety bond issued to Lenz Sales & Service, Inc. by Capitol Indemnity Corporation was in effect at this time. The claim arose during the period covered by the surety bond.

2. Mr. Kiser filed a claim against the motor vehicle dealer bond of Lenz Sales & Service, Inc. on or about March 7, 2000. The bond claim was filed within three years of the last day of the period covered by the surety bond. The claim is timely filed pursuant to Wis. Adm. Code § Trans 140.21(1)(d).

3. The Dealer engaged in acts that would be grounds for suspension or revocation of its motor vehicle dealer license under Wis. Adm. Code § Trans 140.21(1)(c). The claimant has demonstrated that he suffered a loss of \$313.84 from a violation. Accordingly, the claim is allowable in the amount of \$313.84.

4. The Division of Hearings and Appeals has authority to issue the following order.

**ORDER**

The claim filed by Mr. John Lee Kiser against the motor vehicle dealer bond of Lenz Sales and Service, Inc., is APPROVED in the amount of \$313.84. Capitol Indemnity Insurance Company shall pay Mr. Kiser this amount for his loss attributable to the actions of Lenz Sales and Service, Inc.

Dated at Milwaukee, Wisconsin on December \_\_\_, 2000.

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By: \_\_\_\_\_

William S. Coleman, Jr.  
Administrative Law Judge